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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE EMPLOYMENT LAW CENTER, A PROJECT OF THE LEGAL AID SOCIEY OF SAN FRANCISCO, EQUAL RIGHTS ADVOCATES, INC., CHINESE FOR AFFIRMATIVE ACTION, NATIONAL ECONOMIC DEVELOPMENT AND LAW CENTER, HUMAN RIGHTS ADVOCATES, WOMEN'S EMPLOYMENT RIGHTS CLINIC (GOLDEN GATE UNIVERSITY SCHOOL OF LAW), PROFESSOR MARIA BLANCO, PROFESSOR CONNIE DE LA VEGA, PROFESSOR MARCI SEVILLE, AND PROFESSOR STEPHANIE WILDMAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

As organizations and individuals concerned with securing full equality of opportunity in education, employment, and contracting, *amici* have a strong interest in this case, and therefore respectfully submit this brief. A full recitation of their interests in this case is contained in the Appendix hereto.

The written consents of the parties to the submission of this brief have been lodged with the Clerk pursuant to Rule 37.2.

INTRODUCTION

Since its establishment by the Commonwealth of Virginia in 1839, the Virginia Military Institute (VMI) has excluded women from admission to its unique, adversative training program. VMI's mission is to graduate "citizen-soldiers" who will provide leadership in civilian life and the military. Focusing on character development and leadership training, VMI's educational program stresses physical and mental rigor, equality of treatment, lack of personal privacy and cultural indoctrination. After more than a century of women being denied the right to a VMI-type education, the United States challenged VMI's male-only admissions policy under the Equal Protection Clause of the Fourteenth Amendment.

In an apparent contradiction of terms, the district court held that VMI's male-only admission policy was substantially related to the important state interest of promoting "diversity" of education through a single-sex education program. *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991). Although the Court of Appeals for the Fourth Circuit expressed concern that women be offered the unique benefits of a VMI-type of education, it upheld VMI's single-sex program. In so doing, the court ordered the State to "formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment." *United States v. Virginia*, 976 F.2d 890, 900 (4th Cir. 1992) (*VMI I*). The court remanded the case for further proceedings to determine whether there were constitutional alternatives for providing women with a similar education short of actually admitting women to VMI.

To comply with the court's order, the State proposed an alternative program—the Virginia Women's Institute for Leadership (VWIL)—designed specifically to address the

"different educational needs of women" in the quest to produce female citizen-soldiers. The proposed VWIL program is but a mere shadow of the full educational experience offered at VMI. Glaringly absent from the VWIL proposal is VMI's unique military model, including its critical adversative method. This is not the only difference between these two programs. While the VMI curriculum focuses on math and sciences, VWIL would not offer a Bachelor of Science degree. Engineering degrees would only be conferred if VWIL students entered a joint program and attended a private Missouri university for two years.

Physical rigor, deemed an essential component of the VMI educational experience, would be all but lost at VWIL where the athletic and training facilities are substantially less sophisticated and extensive. In addition to these programmatic disparities, VWIL could not match the prestige associated with a VMI degree. VWIL simply would not enjoy the 150-year history and tradition associated with VMI, and its graduates cannot expect to have equivalent support from the powerful VMI alumni network. Despite all of this, the district court approved the VWIL plan. *United States v. Virginia,* 852 F.Supp. 471 (W.D. Va. 1994).

Three years later the Fourth Circuit affirmed the state's VWIL proposal, applying an unprecedented "special intermediate scrutiny" test. *United States v. Virginia,* 44 F.3d 1229 (4th Cir. 1995) (*VMI II*). The court deferred to the "state's election of educational techniques [because] the purpose of providing single-gender education is *not pernicious* and falls within the range of the traditional governmental objective of providing citizens higher education." *Id.* at 1239 (emphasis supplied). Relying heavily on arcane notions about the relative capabilities of women and men, the court justified an all-male VMI by endorsing the dissimilar "female" version: VWIL.

In evaluating the VWIL program, the court departed from the two-prong intermediate scrutiny standard as

recently articulated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Ignoring significant disparities between the programs, the court focused on whether men and women would have "opportunities to obtain substantively comparable benefits." Finding no pernicious motive for the sex-based exclusion and concluding that VMI and VWIL would be comparable despite vast differences, the court approved the VWIL proposal. This intermediate scrutiny analysis finds no basis in this Court's precedents and should be expressly disapproved. Consequently, this Court may overturn these decisions under a correctly applied intermediate scrutiny analysis.

Amici also urge this Court to adopt strict scrutiny for invidious gender-based discrimination such as VMI's exclusion of women. Should the Court apply strict scrutiny in this case, it should reconsider the implications of applying strict scrutiny to remedial and non-invidious programs that are designed to assist members of particular groups in overcoming burdens disproportionately faced. Adoption of the strict scrutiny standard for invidious, intentional, gender-based discrimination—although a monumental step forward in the quest for women's rights—may harm women who currently benefit from existing affirmative action and other gender-based remedial programs if such programs are also subject to the demanding strict scrutiny test.

This Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, —— U.S. ——, 115 S. Ct. 2097 (1995) establish a standard requiring "consistency" in evaluating both "invidious" and "benign" classifications. This requirement undermines the remedial purpose of programs that seek to rectify intentional, invidious discrimination. A truly consistent approach would consider the nature of the classification—benign or invidious—and tailor the level of scrutiny to its underlying purpose. The Fourteenth Amendment contemplates the use of such classifications, even if they favor members of one sex or

race, to combat discrimination. "[E]ven if we completely disregard our history of racial injustice, race is not always irrelevant to sound governmental decisionmaking." *Croson*, 488 U.S. at 512 (Stevens, J., concurring in part and concurring in the judgment).

This nation's painful history of discrimination continues to this day. Remedial classifications that promote inclusion do not suffer from the invidious character of classifications that stigmatize and harm, and need not be subject to the highest scrutiny. This Court should seize the opportunity to finally acknowledge that gender-based discrimination deserves strict scrutiny, and to strike down the "consistent" application of the strict scrutiny standard to both invidious and remedial classifications.

ARGUMENT

I. VMI'S EXCLUSION OF WOMEN VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION.

The United States Constitution guarantees all persons equal protection under the law. U.S. CONST. amends. V, XIV. For more than twenty-five years, this Court has applied a heightened level of scrutiny to classifications based on gender. *Reed v. Reed*, 404 U.S. 71 (1971). This two-prong standard requires that classifications based on gender: (1) be supported by legitimate and important state interests; and (2) be substantially related to those interests. *Craig v. Boren*, 429 U.S. 190, 197 (1976). This Court has demanded an "exceedingly persuasive justification" for sex-based classifications, and has rejected those that reflect outdated stereotypes of women's roles and abilities. *Hogan*, 458 U.S. at 724 (1982); *J.E.B. v. Alabama ex rel. T.B.*, ——U.S. ——, 114 S. Ct. 1419 (1994).

The case now before this Court threatens to destroy a quarter-century of progress for women. The Fourth Cir-

cuit's opinions in *VMI I* and *VMI II* constitute a radical departure from the intermediate scrutiny standard.

A. VMI Does Not Have a Legitimate and Important Interest That Justifies Its Exclusion of Women.

VMI must demonstrate an "exceedingly persuasive justification" for its discriminatory policy. *Hogan*, 458 U.S. at 724. The Fourth Circuit failed to address this prong of the intermediate scrutiny standard. *See VMI II*, 44 F.3d at 1237. Had it done so, that court would have discovered that VMI's proferred interests are suspect and contain stereotypical assumptions prohibited by the Equal Protection Clause.

1. *The Fourth Circuit's Deference to VMI's* Post Hoc *Justifications for Exluding Women Was Unwarranted, and This Court Should View These Justifications with Suspicion.*

As Judge Phillips noted in his dissent below, finding a state interest to support the exclusion of women from VMI presents "a real problem of identification in this case." *VMI II*, 44 F.3d at 1246. When VMI opened its doors more than 150 years ago, it did not contemplate alternatives to a male-only admissions policy, but simply incorporated implicit assumptions regarding men and women that were prevalent at the time. Not only were women denied full participation in political or civil life, but they were excluded from the military realm altogether. Relegated to home and hearth, nineteenth-century women could not vote, "hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

Thus, the only interests articulated to justify VMI's exclusion of women are necessarily after-the-fact "rationalizations, compelled by the exigencies of this litigation rather than the actual purpose" of VMI. *VMI II*, 44 F.3d at 1247 (Phillips, J., dissenting). This Court has viewed

such justifications with skepticism. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring in result); *Frontiero*, 411 U.S. 677 (1973). In such circumstances, the Equal Protection Clause requires that these interests be subject to rigorous examination to determine whether they reflect "archaic and stereotypic notions." *Hogan*, 458 U.S. at 725. Moreover, the convoluted history of the interests offered to justify excluding women from VMI warrants close scrutiny by this Court.[1]

Here, however, the Fourth Circuit inappropriately allowed VMI's articulation of interests to enjoy significant deference "so long as the purpose [was] not pernicious and [did] not violate traditional notions of the role of government . . ." *VMI II*, 44 F.3d at 1237. Deference is not appropriate here, *see Califano v. Goldfarb*, 430 U.S. 199, 210-11 (1977), and undermines the integrity of the heightened scrutiny standard normally applied to gender classifications. Moreover, the purported interests here are not the reasoned deliberations of an elected democratic body to which deference may be appropriate. *Id.* at 212. It is the policy of the VMI Board of Visitors, and not the Commonwealth of Virginia, that keeps VMI an all-male institution. *United States v. Virginia*, 766 F. Supp. at 1412, 1419. The Commonwealth's initial failure to defend the classification renders the legitimacy and importance of any state interest all the more dubious.[2] *See Kirchberg v. Feenstra*, 450 U.S. 455, 460 n.7 (1981).

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[1] Interests proffered include the goal of "diversity in education" through maintaining VMI's all-male status and "distinctive educational method," *United States v. Virginia*, 766 F. Supp. at 1411; VMI's mission of producing "citizen-soldiers, educated and honorable men who are suited for leadership in civilian life," *VMI I*, 976 F.2d at 898; and the "objective of providing single-gender education" adapted differently for men and women, *VMI II*, 44 F.3d at 1237.

[2] The VMI Foundation, the VMI Alumni Association, and private organizations associated with VMI all intervened after the Commonwealth of Virginia declined to defend this suit. *United States v. Virginia*, 766 F. Supp. at 1408.

2. *VMI's Purported Interest in "Single-Sex Education" is Impermissible Because It Circumvents Scrutiny and Encompasses Gender Stereotypes.*

VMI claims a legitimate and important interest in single-sex education simply for the sake of single-sex education. *VMI II*, 44 F.3d at 1237-39. Asserting that single-sex institutions are "pedagogically justifiable" without more does not prove they are constitutional. *See Hogan*, 458 U.S. at 731. In accepting this justification, the Fourth Circuit bypassed the rigorous two-part analysis required.[3] VMI must demonstrate that the classification is substantially related to furthering some separate goal, not simply offer the circular justification that "[VMI's] single-sex status would be lost . . . if it were to admit women." *See United States v. Virginia*, 766 F. Supp. at 1413.

VMI's fluctuating explanation for maintaining an all-male institution belies its true purpose. In *VMI I*, it was not the "maleness" of VMI that precluded admitting women, but the purported need for homogeneity of gender. 976 F.2d at 897. Faced with a court order requiring remedy, however, VMI now claims that its program is suitable only for men. According to testimony offered by the State, "[w]hat women need is a system that builds their sense of self-efficacy," not VMI's rigorous methodology designed for men and their "inflated sense of self-efficacy." *VMI II*, 44 F.3d at 1234.

The Fourth Circuit embraced these stereotypical assumptions. According to the court, the sex-segregated system offered by the State will build women's "sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes." *VMI II*, 44 F.3d at 1234 (internal quotation omitted). Acknowledging that "there remains some disagreement among the experts," the court relies on "com-

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[3] The court below admits as much: "[O]nce the state's objective is found to be an important one, the classification by gender is by definition necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny." *VMI II*, 44 F.3d at 1237.

mon experience" to find that single-sex institutions have intrinsic value because "the focus is properly on matters other than relationships between the sexes." *Id.* at 1238-39. VMI's purported interest is nothing more than an assertion that women are unqualified and unable to succeed in the rigorous, adversative program at VMI.

"[I]f a statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Hogan*, 458 U.S. at 725. Here, the justification both for excluding women from VMI and for remedying that constitutional violation signifies that women are unable to meet challenges or have success at VMI, and must be protected from their inevitable failure. Just as women were once "protected" from the rigors of the practice of law, *Bradwell v. Illinois*, 83 U.S. 442, 16 Wall. 130 (1873), VMI's admissions policy seeks to "protect" women from the rigors of a military education. Laws that perpetuate these arcane characterizations of women's abilities have long since been rejected by this Court. *See Hogan*, 458 U.S. at 725 n.10.

3. *This Court Should Reject VMI's Purported Interest in "Citizen-Soldiers."*

In the end, VMI is left only with the objective expressed in the VMI mission statement: to produce "citizen-soldiers, educated and honorable men . . . who are suited for leadership in civilian life and who can provide military leadership when necessary." *VMI I*, 976 F.2d at 893. It appears, however, that an invidious motive—discrimination against women—drives the continuing male-only admissions policy. *See VMI II*, 44 F.3d at 1247 (Phillips, J., dissenting).

B. Even if VMI's Interests Were Legitimate and Important, Its Exclusion of Women Is Not Substantially Related to Furthering Those Interests.

Even if VMI's objective of producing "citizen-soldiers" were legitimate and important, excluding women must be substantially and directly related to the achievement of

that goal to withstand constitutional scrutiny. *Hogan*, 458 U.S. at 730. A close relationship between the objective and the classification "assures that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 725-26. Where the state's purpose is "as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex . . . [T]his is doubly so where the [classification] benefit[s] . . . those without need for special solicitude." *Orr v. Orr*, 440 U.S. 268, 283 (1979).

VMI's exclusion of women is not substantially and directly related to its interest in "citizen-soldiers." The Fourth Circuit speculated that admitting women would "destroy aspects of VMI's program which lie near the core of its holistic system and . . . deny [women] the very benefit they sought by their admission" because the program's adversity, physical training and lack of privacy might change. *VMI II*, 44 F.3d at 1233. The court failed to examine the connection between the purported interest and the exclusion of women, focusing instead upon the relationship between VMI's existing program and its exclusive policy. It is the relationship between the classification and producing citizen-soldiers, however, that is at issue here. The program itself is merely a means to this end. VMI does not have an important interest in continuing its educational program exactly as it is.[4]

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[4] Although VMI's educational program may rest on a male-only tradition, "[m]any of our people's traditions, . . . such as *de jure* segregation and the total exclusion of women from juries, are now unconstitutional even though they once co-existed with the Equal Protection Clause." *J.E.B.*, —— U.S. ——, 114 S. Ct. at 1429 n.15 (internal quotation omitted). VMI cannot now maintain that it has an important interest in continuing its historical discrimination.

Careful analysis of the relationship between VMI's exclusion of women and its purported objective of citizen-soldiers demonstrates that VMI's justifications rest on arcane characterizations of women. VMI's contention that admitting women would require lower physical standards is nothing more than an overbroad generalization that women are the weaker sex. *See Hogan*, 458 U.S. at 725 (generalizations that members of one gender are innately inferior are illegitimate). "[E]ven if a measure of truth can be found in some . . . gender stereotypes . . ., that fact alone cannot support discrimination on the basis of gender . . ." *J.E.B.*, —— U.S. ——, 114 S. Ct. at 1427 n.11. VMI does not, nor can it dispute that some women would be able to meet the existing physical requirements. *United States v. Virginia*, 766 F. Supp. at 1438. The exclusion of women cannot be justified simply because some women cannot meet VMI's physical standards: some men cannot meet these standards either. That some women may fit the overbroad characterization VMI supplies does not change the fact that VMI excludes women willing and able to complete its program.

Moreover, VMI has failed to demonstrate that its uniform and exceedingly high physical training standards are necessary to produce citizen-soldiers. Other physical training programs have graduated men and women who have achieved the highest military and political positions. *See United States v. Virginia*, 766 F. Supp. at 1428 (describing West Point training program). VMI's insistence that women would undermine its physical training program is simply an attempt to retain its exclusionary tradition.[5]

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[5] VMI contends that the inevitable dual physical standards for men and women would cause "jealousy and resentment" among the ranks. *VMI I*, 976 F.2d at 896; *United States v. Virginia*, 766 F. Supp. at 1440. Presumably any integration of an all-male institution that wishes to remain exclusive would cause resentment. This Court should not condone the anticipated discriminatory reactions of cadets. *Cf. Loving v. Virginia*, 388 U.S. 1 (1967).

VMI's contention that the adversative nature of its program would have to change is similarly unconvincing. It is conceded that "the VMI methodology could be used to educate women" and that "some women . . . may prefer the VMI methodology." *United States v. Virginia*, 852 F. Supp. at 481. *See also United States v. Virginia*, 766 F. Supp. at 1436 (between 1988 and 1990, VMI received inquiries from 347 women). The Fourth Circuit, however, found that single-gender institutions are necessary because the adversative process "would destroy . . . any sense of decency that still permeates the relationship between the sexes." *VMI II*, 44 F.3d at 1239. This assumption rests on stereotypes of men as chivalrous protectors of the sensibilities of women from foul language and moral depravity. *See Bradwell*, 83 U.S. at 446 ("Man is, or should be, woman's protector and defender."); *J.E.B.*, —— U.S. at ——, 114 S. Ct. at 1423 (women historically excluded from juries because of the "ostensible need to protect women from the ugliness and depravity of trials"). The State has failed to show that "adversative training" is substantively related to its citizen-soldier goal.[6]

VMI also asserts that complete lack of privacy requires that the entire school be one sex. At VMI, there are no locks on room doors, no curtains on the windows in those doors, and there is "a total lack of privacy in the barracks." *VMI I*, 976 F.2d at 894. Similar intrusive living conditions, however, could be created by simply building a separate barracks for women. *See United States v. Virginia*, 766 F. Supp. at 1443 (describing West Point facilities). This Court must question whether this "priv-

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[6] The State's assertion that the proposed, non-"adversative" program to be established at Mary Baldwin is "substantively comparable" to VMI undermines its own allegiance to the adversative technique. "[I]f the proposed program at Mary Baldwin is truly 'substantively comparable' to the VMI program, the 'adversative' training must not be critical to the VMI program . . ." *United States v. Virginia*, 52 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting from denial of rehearing *en banc*).

acy" justification is merely a pretext for excluding women, particularly given the success of the cceducational United States military academies that graduate far more leaders than does VMI every year.

VMI has failed to demonstrate why its all-male program is necessary to further its purported interest in citizen-soldiers. Means other than excluding women from VMI are available to reach its claimed interest, but VMI refuses to consider them. *See Orr v. Orr*, 440 U.S. at 283. The other justifications offered incorporate impermissible stereotypes and archaic and overbroad generalizations about the roles and abilities of women. *See Hogan*, 458 U.S. at 724-25. VMI has failed to demonstrate an exceedingly persuasive justification for excluding women and this Court should strike down the discriminatory policy.

II. THE PROPOSED VWIL PROGRAM WOULD NOT OFFER WOMEN A VMI EDUCATION AND IS NOT A SUFFICIENT REMEDY FOR THE STATE'S VIOLATION OF EQUAL PROTECTION.

In framing a remedy to repair the denial of a constitutional right, the task is to correct the condition that offends the Constitution. The nature of the violation determines the scope of the remedy. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971). A district court must tailor the scope of the remedy to fit the nature and extent of the violation. *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976). The remedy must be designed to eliminate as far as possible the discriminatory effects of the past as well as bar like discrimination in the future. *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

In this case, the violation as articulated by the appellate court in *VMI I* is that the State offers VMI's unique benefits to men and not to women. 976 F.2d at 899. In finding a constitutional violation, the appellate court stressed the distinctive nature of VMI's type of education: "VMI's military program is *absolutely unique*. *No other*

school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI." *Id.* at 898 (emphasis supplied, internal quotations omitted). The court ordered the State to remedy the violation by admitting women to VMI, by withdrawing support from VMI, or by establishing a parallel program for women. *Id.* at 900. The remedy selected by the State is the establishment of an all-female Virginia Women's Institute for Leadership at Mary Baldwin College, a private women's college. The sufficiency of this remedy is now before the Court.

The Virginia Women's Institute for Leadership does not yet exist, and would not offer women VMI's "unique and intense" education program utilizing "adversative" techniques. Women enrolled in the proposed school would instead: take courses in leadership, including research relevant to women and leadership; participate in Saturday seminars sponsored by more senior students on designated subjects; complete a leadership externship; participate in a speakers series; organize and carry out community service projects; participate in ROTC; take physical education, including a "cooperative confidence building program"; and participate in the "largely ceremonial" Virginia Corps of Cadets. *VMI II*, 44 F.3d at 1234. Indisputably, "VWIL would not be organized under the pervasive military regimen that exists at VMI." *Id.*

In short, the Commonwealth of Virginia continues to limit the unique benefits of a VMI-type of education, complete with prestige, tradition and alumni influence, to men. Moreover, VMI continues to challenge the Fourth Circuit's holding that offering the VMI program to men and not to women violates the Constitution. At some future date, women may be able to enroll in a completely different non-"adversative" educational program with no tradition and at best unknown access to prestige or alumni influence. This proposal cannot correct the State's violation of equal protection, even as narrowly defined by the

Fourth Circuit in *VMI I*. Instead, that violation is aggravated by the specter of a two-school system that segregates men and women into separate spheres by restricting prestige and military training to men, and relegating women to community service and a ceremonial corps.

III. THE CONTEMPLATED TWO-SCHOOL SYSTEM, CONSISTING OF VMI AND THE PROPOSED VWIL, CANNOT SURVIVE INTERMEDIATE SCRUTINY.

The proposed VWIL program has not been independently challenged as a violation of equal protection, nor has the contemplated two-school system of VMI and VWIL been so challenged. The proposed VWIL program is offered by the State as a remedy to the violation found in *VMI I*. Despite this procedural posture, in *VMI II* the Fourth Circuit purported to subject the existing VMI and the proposed VWIL to intermediate scrutiny as a two-school system. In a further departure, the appellate court declined to apply intermediate scrutiny as articulated in *Craig v. Boren*, and instead employed a newly created "special intermediate scrutiny" test that replaces the two-prong standard with a singular focus on whether the State offers "substantively comparable" benefits to men and women.

A. The Commonwealth Has Not Shown That the Maintenance of an All-Male VMI and the Creation of an All-Female VWIL Is Substantially Related to Important State Interests.

In *VMI I*, the Fourth Circuit held that VMI's use of single-sex "adversative" techniques is a constitutional means to achieve an interest in "citizen-soldiers," but that the State must offer the "unique benefits" of a VMI-type education to both men and women. 44 F.3d at 890. The State subsequently proposed a completely different type of education for women only, asserting a new interest in promoting leadership and education through single-sex programs that vary for men and for women. 44 F.3d at 1239-41. The shifting justifications offered in this case

only heighten the suspicion warranted where the State's position is fashioned by the *post hoc* findings of state experts and task force members, and where VMI continues to contend that it need not provide *any* remedy for its exclusion of women.

The proposed two-school system that has emerged confirms that suspicions are rightly raised. Even if obtaining pedagogical benefits or promoting leadership were deemed by this Court to be sufficiently important to justify a sex-based classification, the creation of two vastly different educational programs, one for males and one for females, is not substantially related to achieving these objectives.[7] Indeed, fundamental distinctions between VMI and VWIL correlate to stereotyped views about the relative abilities of men and women. While VMI retains a military-style education for males only, females are relegated to a program that stresses leadership development and community service. Only VMI offers a math and science focus and a Bachelor of Science degree. Similarly, the athletic and physical training facilities at VMI are far more extensive and sophisticated than those at Mary Baldwin College. These disparities serve to perpetuate the discrimination and disadvantage that women already face in obtaining military education, pursuing careers in math or science, or participating in athletics.[8]

Were the State's position upheld by this Court, then any state would be permitted to offer completely different

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[7] Even if the expert testimony offered by the Commonwealth were uncontroverted, this evidence does not suggest that vast disparities among the educational options available to males and to females are substantially related to the achievement of pedagogical benefits. *See United States v. Virginia*, 766 F. Supp. at 1434.

[8] Women are often discouraged from pursuing careers in math and science, and face disparities in access to athletics. *See* MYRA SADKER AND DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS 120-28 (1994); AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS 28-30 (1982); NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA GENDER-EQUITY STUDY: SUMMARY OF RESULTS tables 1-2 (1992).

educational options to men and to women pursuant to the determinations of a state-appointed task force, with merely a citation to expert testimony regarding the benefits of single-sex education. The Fourth Circuit's ruling in *VMI II* apparently presumes that the assumptions and legal reasoning of an earlier era still hold today. In *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971), the district court denied a challenge from male plaintiffs to the exclusive policies of a women's college in light of the fact that another state-supported college limited enrollment to men. Applying a rational basis standard [9] and citing pedagogical opinion, the *Williams* court found that the two schools were justified simply because the all-male school was designated as a military school while the all-female school "gave special attention to many courses thought to be specially helpful to female students," described by the state legislature as including stenography, sewing, dress-making, needlework, cooking, housekeeping, "and such other industrial arts as may be suitable to their sex." *Id.* at 136, n.3. The *Williams* analysis does not survive to the present.

The appellate court's analysis attempts to revive the deferential standard applied in *Williams*, and in so doing similarly endorses separate spheres for women and men. While conceding that "there remains some disagreement among the experts about the extent of the benefits of single-gender education," the Fourth Circuit concluded that it should "defer to a state's selection of educational techniques" so long as "the purpose of providing single-

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[9] Among other cases, the *Williams* court cited *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding statute providing minimum wages for women but not men); *Radice v. New York*, 264 U.S. 292 (1924) (upholding statute limiting hours of night work of women); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding statute barring women from bartending); *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding voluntary jury duty for women but compulsory for men). 316 F. Supp. at 136. This Court has since repudiated such cases. *See Hogan*, 458 U.S. at 725-26 n.10.

gender education is not pernicious." *VMI II*, 44 F.3d at 1239. While such deference was commonly applied prior to *Reed v. Reed*, 404 U.S. 71 (1971), in 1995 it is completely at odds with the jurisprudence of equal protection developed by this Court over nearly twenty-five years and recently articulated in *Hogan*.

B. The Contemplated Two-School System Would Not Even Offer Substantively Comparable Benefits to Men and to Women.

The State asserts that the contemplated two-school system of VMI and VWIL is constitutionally permissible because it would offer men and women "substantively comparable" benefits in that both programs teach discipline and prepare students for leadership. The district court approved the plan, finding that the cooperative method to be offered at VWIL would achieve "substantially similar outcomes." *United States v. Virginia*, 852 F. Supp. at 476. The Fourth Circuit agreed:

> Both VMI and VWIL are focused on *results* beyond simply awarding an undergraduate degree. Both seek to teach discipline and prepare students for leadership. The missions are similar and *the goals are the same*.

VMI II, 44 F.3d at 1240 (emphasis supplied). The appellate court then upheld the contemplated two-school system, and ordered judicial review to ensure that the proposed VWIL program, when compared with VMI, would not tend to "lessen the dignity, respect, or social regard" of women. *Id.* at 1242.

This Court has not endorsed a comparability standard for single-sex schools,[10] and has never recognized a com-

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[10] Nearly two decades ago, the Court summarily affirmed the Third Circuit's opinion in *Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977). A summary affirmance does not enjoy the full precedential value of a case argued on the merits and disposed of by written opinion. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

parability standard based on outcome or educational goals alone.[11] In the context of race, a higher standard—"separate but equal"—has been rejected as inadequate. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Even if an outcome analysis were adequate, the two-school system proposed by the State would not even offer men and women the same degrees.[12] That women may obtain one state-identified benefit--leadership training—at another program does not alter the fact that women are denied virtually all other benefits of the VMI experience and degree.

The little case law that exists regarding the comparability of segregated schools does not limit itself to whether the schools share similar goals, but focuses instead upon the various components of schools, including courses, facilities and faculty, as well as such intangibles as prestige and alumni networks. *See Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880, 881-82 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977). In *Sweatt v. Painter*, this Court stressed intangible qualities "incapable of objective measurement": "Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." 339 U.S. 629, 634 (1950).

As the dissent noted in *VMI II*, "the contrast between the two [schools] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recita-

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[11] In *Sweatt v. Painter*, 339 U.S. 629 (1950), that the plaintiff barred from an all-white law school could obtain a legal education from another all-black institution did not determine the issue of whether the two schools at issue were "substantially equivalent." *See also Hogan*, 458 U.S. at 723-24 n.8 (1982) (that plaintiff could obtain credit in state-supported coeducational nursing program did not determine constitutional permissibility).

[12] Unlike VMI, Mary Baldwin does not have a math and science focus and does not offer a Bachelor of Science degree. *United States v. Virginia*, 852 F. Supp. at 503. Engineering degrees are only conferred if the VWIL student spends three years at Mary Baldwin College and another two years at Washington University in St. Louis, Missouri. *Id.* at 503.

tion." 44 F.3d at 1250 (Phillips, J., dissenting). VMI offers a military education in a military framework. VMI cadets are required to wear uniforms, live in barracks, eat meals together in a mess hall, complete a boot camp-type regimen, abide by a rigid hierarchy of students, comply with minute regulation of behavior, and regularly take part in parades and drills. *United States v. Virginia*, 766 F. Supp. at 1421-27. In contrast, VWIL would offer leadership education, confidence building and community service requirements. VWIL students would not live in barracks or wear uniforms; beyond ROTC participation, the program would impose no aspect of the rigorous military culture of VMI. *United States v. Virginia*, 852 F. Supp. at 494-98. The appellate court's focus on leadership development as the measure of comparability circumvents scrutiny of the traditional assumptions embodied in the two-school system.[13]

As the dissent correctly noted, VWIL will necessarily be "but a pale shadow" of VMI. "The student and eventual graduate of VWIL will not be able to call on the prestigious name of 'VMI' in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI." *VMI II*, 44 F.3d at 1250. The district court conceded that "even if all else were equal between VMI and [VWIL], the VWIL pro-

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[13] Furthermore, the facilities, faculty, student body and resources offered by the two programs are different. The athletic and physical training facilities at VMI are far superior to those that would exist at VWIL. *United States v. Virginia*, 852 F. Supp. at 503. The faculty at Mary Baldwin College is not as accomplished as the faculty at VMI. *United States v. Virginia*, 852 F. Supp. at 502. While VMI has a student body numbering around 1,300, VWIL would likely begin with a class of 25 to 30 students. *VMI II*, 44 F.3d at 1243-44. VMI's endowment is $131 million—the largest of any undergraduate institution in the United States on a per-student basis. VWIL's endowment is $19 million. *United States v. Virginia*, 852 F. Supp. at 502-03.

gram cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years." *United States v. Virginia*, 852 F. Supp. at 475. Where women are excluded by the State from a powerful institution and relegated to a less prestigious alternative, the Fourteenth Amendment must bar such discrimination and the inevitable stigma that it imparts.

IV. THE COURT SHOULD TAKE THIS OPPORTUNITY TO ADOPT THE STRICT SCRUTINY STANDARD FOR HARMFUL GENDER-BASED CLASSIFICATIONS WHICH SEEK TO EXCLUDE OR STIGMATIZE.

This case provides the Court with the opportunity to revisit its standard of review for invidious gender-based discrimination and squarely hold that such discrimination merits strict scrutiny. VMI's discriminatory policy seeks to disadvantage women on the basis of harmful and outmoded stereotypes. Such pernicious and invidious discrimination should be subject to strict scrutiny. Furthermore, the distinction between invidious discrimination and remedial or affirmative programs must inform the level of review.

A. The Appropriate Standard of Review Remains an Open Question.

This Court has never formally held that gender-based classifications are inherently suspect. Instead, various Justices have consistently reminded litigants and lower courts that application of the equal protection doctrine for women requires a searching inquiry into the classification at issue, but that the status of women as a suspect class has yet to be determined. *J.E.B.*, —— U.S. at —— n.6, 114 S. Ct. at 1425 n.6; *Harris v. Forklift Systems*, —— U.S. ——, ——, 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring); *Hogan*, 458 U.S. at 724 n.9. Now is the time for this Court to eradicate the historical remnants of sex discrimination by extending to women and men the full protection of the Fourteenth Amendment.

This result can only be achieved by subjecting invidious gender classifications to the most rigorous and exacting judicial scrutiny under the Constitution.

B. Women Face Historic and Current Pernicious Discrimination.

Over the past quarter-century this Court has come to recognize our nation's "long and unfortunate history of sex discrimination." *Frontiero*, 411 U.S. at 684 (plurality). As Justice O'Connor observed in *Hogan*, "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function." 458 U.S. at 725 n.10.

Ironically, this Court long endorsed these legislative actions. *See Bradwell*, 83 U.S. at 446 ("in view of the peculiar characteristics, destiny, and mission of women, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men . . ."); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) ("[t]he fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the states from drawing a sharp line between the sexes."). In a series of now discredited cases, this Court also upheld labor laws enacted in the nineteenth and early twentieth centuries designed to protect women based on their perceived frailty. *See, e.g., Muller v. Oregon*, 208 U.S. 412 (1908). It is only recently that the Court has invalidated such measures as violative of equal protection under the law. *See Reed v. Reed*, 404 U.S. at 76.

Although the Court has since recognized that "[n]o longer is the female destined solely for the home and the rearing of the family and only the male for the marketplace and the world of ideas," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), barriers to women's full equality still

exist. Despite women's gains, discrimination continues to impose obstacles to women's full participation in public life. As recently as last year, this Court addressed a system of ongoing discrimination in jury selection. *J.E.B.*, —— U.S. ——, 114 S. Ct. 1419 (1994). Whether it is employers erecting "glass ceilings" in the workplace, schools and universities devoting fewer resources to women's athletics, or the continued exclusion of women from VMI, both overt and subtle discrimination remains a painful reality that deprives women of opportunities solely because of their sex. Equal protection doctrine must recognize that the continuing discrimination women face is rooted in outmoded perceptions of their proper roles rather than realistic assessments of their abilities relative to men.

A plurality in *Frontiero* recognized that because sex is an immutable characteristic which has been grounds for denying basic civil and political rights to women for centuries, "classifications based on sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688. The Court has condemned continuing forms of discrimination which "serve[] to ratify and perpetuate invidious, archaic and overbroad stereotypes about the relative abilities of men and women," *J.E.B.*, —— U.S. at ——, 114 S. Ct. at 1422. Nevertheless, this Court has consistently declined to extend to invidious sex-based distinctions the searching judicial inquiry warranted by this history of discrimination.

As women continue to surmount historic barriers, the realm of "valid" distinctions that society perceives to exist between the sexes becomes ever narrower. This Court should acknowledge that classifications which exclude one gender are inherently suspect and unlikely to reflect relevant differences between the sexes. Adoption of a strict scrutiny standard for invidious gender-based discrimination will enable women to overcome the remaining vestiges

of centuries of officially sanctioned discrimination, and accord both women and men the protection that the Fourteenth Amendment's guarantee requires.

C. This Court as Well as State Courts Have Increasingly Recognized the Need for a More Exacting Standard to Judge Gender-Based Discrimination.

This Court has steadily imposed more stringent levels of scrutiny in gender challenges. Beginning with a heightened rational basis standard under *Reed v. Reed*, 404 U.S. 71 (1971), the Court went on in *Frontiero* to enumerate the reasons why gender-based discrimination deserves strict scrutiny. 411 U.S. 677 (1973). In *Craig v. Boren*, 429 U.S. 190 (1976), the Court held that sex-based classifications must be "substantially related to an important governmental interest." Since that case, Justices have used increasingly exacting language to describe the level of scrutiny. In *Hogan*, the Court specified that the asserted state interest must be "exceedingly persuasive." 458 U.S. at 724 (1982).

State courts have already recognized that discrimination against women merits strict scrutiny under state constitutional guarantees. At least ten state supreme courts have interpreted state constitutional equal rights amendments or equal protection clauses in their state constitutions to mandate strict scrutiny.[14] This Court should similarly subject invidious gender-based distinctions to the highest standard of judicial scrutiny.

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[14] *Hewitt v. State Accident Ins. Fund*, 294 Or. 33, 653 P.2d 970 (1982); *Sail'er Inn v. Kirby*, 5 Cal.3d 1, 485 P.2d 529 (1971); *In Re Marriage of Flaherty*, 31 Cal.3d 637, 646 P.2d 179 (1982); *LeClair v. LeClair*, 137 N.H. 213, 624 A.2d 1350 (1993); *People v. Salinas*, 191 Colo. 171, 174, 551 P.2d 703, 705 (1976); *Rand v. Rand*, 280 Md. 508, 374 A.2d 900 (1977); *Darrin v. Gould*, 85 Wash. 2d 859, 540 P.2d 882 (1975); *In the Interest of McLean*, 30 Tex. Sup. Ct. J. 206, 725 S.W.2d 696 (1987); *Lowell v. Kowalski*, 380 Mass. 663, 405 N.E.2d 135 (1980); *Illinois v. Ellis*, 57 Ill. 2d 127, 311 N.E.2d 98 (1974); *Page v. Welfare Comm.*, 170 Conn. 258, 365 A.2d 1118 (1976).

V. CLASSIFICATIONS WHICH SEEK TO ASSIST MEMBERS OF ONE SEX WHO ARE DISPROPORTIONATELY BURDENED ARE NOT INVIDIOUS, AND DO NOT MERIT THE HIGHEST LEVEL OF REVIEW.

If this Court adopts a standard of strict scrutiny for sex-based discrimination, it should also recognize that remedial and non-invidious classifications do not merit the highest standard of scrutiny. Under the Court's current reasoning, the adoption of strict scrutiny may threaten programs that seek to assist members of a particular group in overcoming unique burdens and to thereby promote full societal integration.

While strict scrutiny is the appropriate standard by which to judge classifications that reflect outmoded stereotypes or stigmatize on the basis of sex or race, classifications that seek to *include* or to overcome continuing social disadvantage serve a different governmental purpose and do not merit the highest level of judicial inquiry. This Court's decisions in *Croson*, 488 U.S. 469 (1989) and *Adarand*, —— U.S. ——, 115 S. Ct. 2097 (1995) establish a standard of consistency in evaluating both "invidious" and "benign" classifications. Such a standard, however, eviscerates the purpose and meaning of the Fourteenth Amendment's promise of equal protection: it fails to recognize the moral and historical difference between a tradition of exclusion and an ethic of inclusion. Consistency is a slender reed upon which to fashion Fourteenth Amendment protections.

A. Relevant, Compensatory Classifications Are Within the Original Intended Purpose of the Fourteenth Amendment.

The original intent of the drafters of the Fourteenth Amendment was to permit race-conscious remedial and beneficial government programs. The very Congress which

enacted the Fourteenth Amendment went on to adopt a number of explicitly race-based social welfare programs.[15] That Congress specifically appropriated funds and services "to educate and improve the moral and intellectual condition of . . . the colored youth of the nation," and to relieve the poverty of the freed slaves. Ch. 103, 12 Stat. 796 (1863). Where it created programs available to both blacks and whites, the Reconstruction-era Congress expressly said so. *See* the Southern Public Lands Act of 1866, ch. 127, 14 Stat. 66, 67 (1866). Classifications intended to remedy the present effects of discrimination lie within the central historic purpose of the Fourteenth Amendment. "If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved. . . ." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 405 (1978) (Blackmun, J., concurring in part and dissenting in part).

It was in the context of officially sanctioned and injurious discrimination designed to maintain racial separation and subordination that the strict scrutiny standard developed.[16] The standard was designed to challenge that discrimination which harmed, stigmatized, or burdened groups on the basis of race or other immutable characteristics, not to invalidate compensatory legislation. Applying the standard in *McLaughlin v. Florida*, 379 U.S. 184

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[15] For a comprehensive account of the race-based enactments of the Reconstruction-era Congress, *see* Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 7, *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (No. 76-811, Oct. Term, 1976).

[16] *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans during World War II); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating prohibition on interracial marriage); *cf. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding that racial classification segregating schools "generates a feeling of inferiority . . . that may affect [schoolchildren's] hearts and minds in a way unlikely ever to be undone.").

(1964), the Court noted that "courts must reach and determine the question whether the classifications drawn in a statute are reasonable *in light of its purpose*—in this case, whether there is an *arbitrary* or *invidious* discrimination." 379 U.S. at 191 (1964) (emphasis added). As recognized by Justice O'Connor in *Croson*, "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 488 U.S. at 493. *See also Bakke*, 438 U.S. at 357-58 (1978) (opinion concurring in the judgment in part and dissenting in part) ("racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more.").

B. Programs That Seek to Assist Members of a Group in Overcoming Unique Burdens Need Not Be Subject to Strict Scrutiny.

While strict scrutiny properly challenges invidious discrimination, efforts to assist persons in overcoming disparate burdens and to promote inclusion of all on an equal footing should not be subject to the highest level of judicial inquiry. "[The] principles outlawing the irrelevant or pernicious use of race [are] inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination." *Fullilove v. Klutznick*, 448 U.S. 448, 518 (1980) (Marshall, J., concurring).

Harms inflicted on the basis of membership in a disadvantaged class logically merit responses tailored to the nature of the burden.[17] As Justice Blackmun observed in

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[17] Under some circumstances, remedial educational programs for girls or women might be permissible as a means for addressing past and present educational discrimination against women. *See Hogan*, 458 U.S. at 728. Such discrimination includes historical and present disparities in access to math, science and athletics. *See* MYRA SADKER AND DAVID SADKER, FAILING AT FAIRNESS: HOW

Bakke, "in order to get beyond racism, we must first take account of race." 438 U.S. at 407 (Blackmun, J., dissenting in part). *See also Croson*, 488 U.S. at 512 (Stevens, J., concurring in part and concurring in the judgment) ("race is not always irrelevant to sound governmental decisionmaking");[18] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 317 (1986) (Stevens, J., dissenting) (race conscious measures promoting inclusion should be evaluated under a different standard).

Classifications that promote inclusion do not stigmatize or harm, but promote equality of opportunity by ameliorating the effects of past and continuing disadvantages. "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately bur-

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AMERICA'S SCHOOLS CHEAT GIRLS 15-76 (1994); AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS (1992); NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA GENDER-EQUITY STUDY: SUMMARY OF RESULTS (March 1992). Although such programs may target a particular group, they are neither invidious nor do they seek to exclude. Rather, they are vehicles to promote full inclusion and integration in the larger society for those who may face particular obstacles to access.

[18] Support for this position is found in international treaties as well. The International Convention on the Elimination of All Forms of Racial Discrimination provides that "[s]pecial measures taken for the sole purpose of serving adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such individuals or groups equal enjoyment or exercise of human rights or fundamental freedoms shall not be deemed racial discrimination." International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (adopted by the United States Sept. 8, 1992), art. 1, § 4. *See also* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (adopted by the United States Sept. 8, 1992), arts. 2(2), 3, 26. A treaty ratified by the United States is the supreme law of the land. U.S. CONST. art. VI, cl. 2.

dened." [19] *Hogan*, 458 U.S. at 728. Justice Stevens, dissenting in *Adarand*, criticized the assumption "that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority." —— U.S. at ——, 115 S. Ct. at 2120. Compensatory measures should be evaluated in light of "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 460 (1985) Marshall, J., concurring) (citations omitted).[20]

While this Court lauded "consistency" in *Croson* and *Adarand*, true consistency mandates an application of the

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[19] While assisting women in overcoming historic and present economic disparities is an important and even compelling state interest, affirmative measures must be substantially related to such an interest. In some early cases applying the intermediate scrutiny test, this Court has not always closely examined the relationship, relying instead upon broad generalizations. *See Kahn v. Shevin*, 416 U.S. 351 (1974); *Califano v. Webster*, 430 U.S. 313 (1977). A more precise analysis is found in *Hogan*, in which the Court found that a gender-based admissions policy at a state-supported nursing school was not substantially related to any compensatory purpose. 458 U.S. at 730.

[20] Justice O'Connor remarked in *Croson* that "absent searching judicial inquiry . . . there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegimate notions of racial inferiority." *Croson*, 488 U.S. at 493 (1989). Indeed, judicial inquiry is always warranted in reviewing either racial or gender classifications. However, in *Hogan*, Justice O'Connor was able to "smoke out" the pernicious nature of the classification by applying the lesser intermediate scrutiny standard, despite the state's claim of good intentions: "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification." 458 U.S. at 730.

strict scrutiny standard to all classifications, including gender classifications, that perpetuate the exclusion of any person from the benefits and opportunities of full citizenship on the basis of impermissible criteria. Where classifications seek to combat historic exclusion and afford true equality of opportunity to all individuals, consistency commands recognition of the continuing need for appropriately designed affirmative measures.

CONCLUSION

For all the reasons stated above, the Court should reverse the decisions below and direct entry of judgment for the petitioner.

Respectfully submitted,

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